Koperasi Sahabat Amanah Ikhtiar Bhd v RHB Investment Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-2084–10 OF 2018
HANIPAH FARIKULLAH, LEE SWEE SENG AND AZIZAH NAWAWI JJCA
3 NOVEMBER 2022

Civil Procedure — Pleadings — Failure to plead — Failure to plead causes of action — Whether causes of action for monies had and received, mistake of fact and constructive trust may be heard on appeal though not pleaded

Tort — Negligence — Banker and customer — Investment bank allowed depositor's money to be transferred to third party without depositor's authorisation or mandate — Whether investment bank negligent — Whether investment bank vicariously liable — Whether investment bank owed duty of care to depositor — Whether investment bank breached duty of care when allowing depositor's money to be transferred to third party without mandate — Whether investment bank breached duty of care when investment bank failed to comply with internal banking procedures — Whether loss or damage could be foreseeable arising from breach of duty of care

The respondent ('D1') in this appeal was an investment bank whereas the appellant ('the plaintiff') was a cooperative and a depositor of the respondent's bank. The crux of the appeal was whether D1 was liable for negligence to the plaintiff when it allowed a sum of RM10m deposited into its account with Maybank to be transferred to one Abhar Capital Holdings Sdn Bhd, the third defendant in the High Court ('D3'), that had a trading account with D1 without the authority or instruction from the plaintiff. It ought to be noted that the transfer of the plaintiff's RM10m from D1's account into D3's account was done on the instruction of D2, with the assistance of D1's employee ('SP2') and its Credit Control Department. Earlier in the High Court, the learned judge found in favour of D1 and held that D1 did not have a duty of care to the plaintiff. In the present appeal, the issues arose were: (a) whether D1 as an investment bank owed a duty of care to the plaintiff who had deposited RM10m with D1; (b) whether there was a breach of the duty of care when the investment bank (D1) allowed the RM10m to be transferred to a third party (D3); (c) whether the loss or damage could be foreseeable arising from the breach of the duty of care; and (d) whether the causes of action for monies had and received, mistake of fact and constructive trust may be heard on appeal though not pleaded.

Held, allowing the appeal, and setting aside the order of the High Court with costs of RM40,000 here and below to the appellant subject to allocator:

(1) The court agreed with the plaintiff that there existed a duty of care owed by D1 towards the plaintiff when it received the plaintiff's cheque of RM10m and thereafter the plaintiff may be regarded as a 'customer' of D1, irrespective of whether any formal contract was entered into. All along the plaintiff was labouring under the impression that the sum of RM10m was for the investment bank to invest prudently to give a reasonable return to its customer. The cheque was thus made payable to D1 as the investment bank for it to make investments on behalf of the plaintiff and not to be transferred out to a third party. The court could not accept that D1 owed no duty of care to the depositor in the circumstances of this case. Both the demands of proximity, foreseeability and policy would constrain the court to hold that there was a duty of care (see paras 73 & 75–76).

(2) The court accepted as the correct proposition of law that the test for breach of the duty of care in the context of banking transactions was whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable. A bank had to exercise reasonable skill and care performing banking duties. It was trite that a bank had to ensure that: (a) payment was made with the authority of the customer; and (b) the person who was being paid was entitled to receive the payment. There was breach of duty of care if a bank made payment without the customer's authority or mandate (see paras 59–61).

(3) The court was satisfied that there was a breach of the duty when D1 did not check with the plaintiff on the so-called instruction to transfer the funds deposited of RM10m to D3. A reasonably prudent investment bank having received the sum of RM10m from a depositor would act in a commercially acceptable way to verify the identity of the depositor, the purpose of the deposit and instructions with respect to the deposit of the substantial sum of RM10m. Further, there was a breach of duty of care on the part of D1 when it channelled the plaintiff's RM10m into D3's trading account without due care and regard for the plaintiff's instructions. There was no mandate by the plaintiff to pay out its RM10m to D3. A bank-in slip was a document that evidenced a deposit bank-in of funds into an account, as such, bank-in slip could not amount to a mandate or authorisation by the plaintiff to transfer its RM10m to D3. There was also a breach of duty of care when D1 (through SP2 and the Credit Control Department) failed to comply with the internal banking procedures of D1. D1 was vicariously liable for the acts of SP2 and its Credit Control Department. Based on the above findings, the

court held that D1 had been negligent in transferring the sum of RM10m deposited with it to D3's account (see paras 123–125, 130–131, 134, 144, 147, 161 & 191).

(4) What was foreseeable was that the monies would then be outside the control of the plaintiff and D1 once it was transferred out without proper mandate from the plaintiff and the consequential and natural losses would be as certain as day would follow night. D1's breach of its duty of care undoubtedly caused the plaintiff to suffer the loss of RM10m. The court agreed with the plaintiff that but for D1's breach, the RM10m would not have been channelled to D3's trading account which then enabled D3 to siphon off the monies shortly thereafter (see paras 167 & 175).

(5) A case argued on negligence could not be further stretched and shoehorned to sustain and support other causes in the like of money had and received, mistake of fact or constructive trust without pleading facts peculiar to such separate causes of action. The cross-examination of the plaintiff's witnesses by learned counsel for D1 had been focused on the allegations of negligence and that was the issue at play at the trial and not that raised for the first time in the present appeal. At any rate, if the plaintiff could not succeed on negligence, the court did not think it could succeed based on the causes of action founded on money had and received, mistake of fact and constructive trust. Likewise, should the plaintiff be able to succeed on negligence, the other causes of action would not have been necessary (see paras 185 & 189–190).

[Bahasa Malaysia summary

Responden ('D1') dalam rayuan ini adalah bank pelaburan manakala perayu ('plaintif') adalah sebuah koperasi dan pendeposit dalam bank responden. Persoalan utama dalam rayuan ini ialah sama ada D1 bertanggungjawab atas kecuaian terhadap plaintif apabila membenarkan sejumlah RM10 juta yang didepositkan ke dalam akaunnya dengan Maybank untuk dipindahkan kepada Abhar Capital Holdings Sdn Bhd, defendan ketiga di Mahkamah Tinggi ('D3'), yang mempunyai akaun dagangan dengan D1 tanpa kebenaran atau arahan daripada plaintif. Perlu diingat bahawa pemindahan RM10 juta milik plaintif daripada akaun D1 ke dalam akaun D3 telah dilakukan atas arahan D2, dengan bantuan pekerja D1 ('SP2') dan Jabatan Kawalan Kreditnya. Terdahulu di Mahkamah Tinggi, hakim yang bijaksana membuat keputusan yang memihak kepada D1 dan memutuskan bahawa D1 tidak mempunyai kewajipan berjaga-jaga ke atas plaintif. Dalam rayuan ini, isu-isu yang timbul ialah: (a) sama ada D1 sebagai bank pelaburan mempunyai kewajipan berjaga-jaga kepada plaintif yang telah mendepositkan RM10 juta dengan D1; (b) sama ada terdapat pelanggaran kewajipan berjaga-jaga apabila bank pelaburan (D1) membenarkan RM10 juta tersebut dipindahkan kepada pihak ketiga (D3); (c) sama ada kerugian atau kerosakan boleh diramalkan timbul

daripada pelanggaran kewajipan berjaga-jaga tersebut; dan (d) sama ada kausa-kausa tindakan bagi wang telah dan diterima, kesilapan fakta dan amanah kontruktif boleh didengar semasa rayuan walaupun tidak diplid.

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi dengan kos sebanyak RM40,000 di sini dan di bawah kepada perayu tertakluk kepada alokator:

(1) Mahkamah bersetuju dengan plaintif bahawa terdapat kewajipan berjaga-jaga oleh D1 terhadap plaintif apabila ia menerima cek plaintif sebanyak RM10 juta dan selepas itu plaintif boleh dianggap sebagai 'pelanggan' D1, tanpa mengira sama ada kontrak rasmi telah dimasuki atau tidak. Sepanjang masa plaintif bekerja keras di bawah tanggapan bahawa jumlah RM10 juta adalah untuk bank pelaburan melabur secara berhemat untuk memberi pulangan yang munasabah kepada pelanggannya. Oleh itu cek telah dibayar kepada D1 sebagai bank pelaburan untuk membuat pelaburan bagi pihak plaintif dan bukan untuk dipindahkan kepada pihak ketiga. Mahkamah tidak boleh menerima bahawa D1 tidak mempunyai kewajipan berjaga-jaga kepada pendeposit dalam keadaan kes ini. Kedua-dua tuntutan kedekatan, kebolehramalan dan dasar memaksa mahkamah untuk memutuskan bahawa terdapat kewajipan berjaga-jaga (lihat perenggan 73 & 75–76).

(2) Mahkamah menerima sebagai kedudukan undang-undang yang betul bahawa ujian untuk pelanggaran kewajipan berjaga-jaga dalam konteks urus niaga perbankan adalah sama ada seorang jurubank berhemat yang munasabah, berdepan dengan keadaan yang sama, akan menganggap tindakan yang diambil ke atas fakta tersebut boleh dibenarkan. Sebuah bank perlu menggunakan kemahiran yang munasabah dan berhati-hati dalam melaksanakan tugas perbankan. Sudah menjadi undang-undang yang mantap bahawa bank perlu memastikan bahawa: (a) pembayaran dibuat dengan kebenaran pelanggan; dan (b) orang yang dibayar layak menerima bayaran tersebut. Terdapat pelanggaran kewajipan berjaga-jaga jika bank membuat pembayaran tanpa kebenaran atau mandat pelanggan (lihat perenggan 59–61).

(3) Mahkamah berpuas hati bahawa berlaku pelanggaran kewajipan apabila D1 tidak menyemak dengan plaintif berkenaan dengan arahan untuk memindahkan dana yang didepositkan sebanyak RM10 juta kepada D3. Bank pelaburan berhemat yang munasabah setelah menerima jumlah RM10 juta daripada pendeposit akan bertindak dengan cara yang boleh diterima secara komersial untuk mengesahkan identiti pendeposit, tujuan deposit dan arahan berkenaan dengan deposit bagi jumlah sebesar RM10 juta. Selanjutnya, terdapat pelanggaran kewajipan berjaga-jaga di pihak D1 apabila ia menyalurkan RM10 juta milik plaintif ke dalam akaun dagangan D3 tanpa berhati-hati dan mengambil kira arahan

plaintif. Tiada mandat oleh plaintif untuk membayar RM10 juta kepada D3. Slip bank-in adalah dokumen yang membuktikan deposit bank-in dana ke dalam akaun, oleh itu, slip bank-in tidak boleh terjumlah kepada mandat atau kebenaran oleh plaintif untuk memindahkan RM10 juta kepada D3. Terdapat juga pelanggaran kewajipan berjaga-jaga apabila D1 (melalui SP2 dan Jabatan Kawalan Kredit) gagal mematuhi prosedur perbankan dalaman D1. D1 bertanggungjawab secara vikarius atas perbuatan SP2 dan Jabatan Kawalan Kreditnya. Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa D1 telah cuai dalam memindahkan jumlah RM10 juta yang didepositkan dengannya ke dalam akaun D3 (lihat perenggan 123–125, 130–131, 134, 144, 147, 161 & 191).

(4) Apa yang boleh diramalkan ialah wang tersebut kemudiannya akan berada di luar kawalan plaintif dan D1 sebaik sahaja ia dipindahkan tanpa mandat yang sewajarnya daripada plaintif dan kerugian berbangkit dan semula jadi adalah pasti seperti siang hari selepas malam. Pelanggaran kewajipan berjaga-jaga D1 sudah pasti menyebabkan plaintif mengalami kerugian RM10 juta. Mahkamah bersetuju dengan plaintif bahawa jika tiada pelanggaran oleh D1, RM10 juta tidak akan disalurkan ke akaun dagangan D3 yang kemudiannya membolehkan D3 menyelewengkan wang tersebut tidak lama selepas itu (lihat perenggan 167 & 175).

(5) Sesuatu kes yang dihujahkan bersandarkan kepada kecuaian tidak boleh dipanjangkan lagi dan diperkukuhkan untuk mengekalkan dan menyokong kausa-kausa lain seperti wang yang telah dan diterima, kesilapan fakta atau amanah konstruktif tanpa memplid fakta-fakta yang khusus kepada kausa-kausa tindakan yang berasingan tersebut. Pemeriksaan balas saksi plaintif oleh peguam terpelajar bagi D1 telah tertumpu kepada dakwaan kecuaian dan itu adalah isu yang dibicarakan dalam perbicaraan dan bukan yang dibangkitkan buat kali pertama dalam rayuan semasa. Walau apa pun, jika plaintif tidak berjaya atas kausa kecuaian, mahkamah tidak fikir ia boleh berjaya berdasarkan kausa-kausa tindakan yang berasaskan wang telah dan diterima, kesilapan fakta dan amanah konstruktif. Begitu juga, sekiranya plaintif berjaya atas kausa kecuaian, kausa-kausa tindakan lain tidak akan diperlukan (lihat perenggan 185 & 189–190).]

Cases referred to

Abou-Rahmah and another v Abacha and others [2006] 1 All ER (Comm) 247, QBD (refd)

Abou-Rahmah and another v Abacha and others [2007] 1 All ER (Comm) 827, CA (refd)

Al-Kandari v JR Brown & Co [1988] QB 665, CA (refd)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2014] 1 MLJcon 134, FC (refd)
European Asian Bank AG v Punjab & Sind Bank (No 2) [1983] 1 WLR 642, CA (refd)
Gran Gelato Ltd v Richcliff (Group) Ltd and others [1992] Ch 560, Ch D (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, HL (refd)
Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)
Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors [2002] 2 MLJ 532, HC (refd)
M'Alister (or Donoghue) v Stevenson [1932] AC 562, HL (refd)
Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd [2010] 9 MLJ 94, HC (refd)
Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467, CA (refd)
Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457, FC (refd)
Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep 147, QBD (refd)
Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 MLJ 123 (refd)
Ng Siew Lan v John Lee Tsun Vui & Anor [2017] 2 MLJ 167, FC (refd)
Niru Battery Manufacturing Co and another v Milestone Trading Ltd and others [2002] 2 All ER (Comm) 705, QBD (refd)
Public Bank Bhd & Anor v Exporaya Sdn Bhd [2013] 1 MLJ 507, CA (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)
Ruben v Great Fingall Consolidated [1906] AC 439, HL (refd)
Semac Industries Ltd v 1131426 Ontario Ltd [2001] OJ No 3443 (refd)
Tate v The Wilts and Dorset Bank, Limited 1 LDAB 286 (refd)
Taxation Comrs v English, Scottish and Australian Bank Ltd [1920] AC 683, PC (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561, FC (refd)
Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal [2020] MLJU 1476, CA (refd)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141, FC (refd)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359, CA (refd)
Yatin bin Mahmood v Mohd Madzhar bin Sapuan & Ors [2010] 8 MLJ 647, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 13, 14

Co-operative Societies Act 1993

Appeal from: Civil No WA-22NCVC-17–01 of 2017 (High Court, Kuala Lumpur)

Ambiga Sreenevasan (with Mohamed Fadly bin Zakariya, Lim Wei Jiet and Andrea Boo) (Fadly Zakariya) for the appellant.
Sean Yeow Huang-Meng (with Andrea Chew Mei Yng) (Lee Hishamuddin Allen & Gledhill) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The central issue in this appeal is whether the respondent, an investment bank, who is D1 in the High Court below, is liable for negligence to the plaintiff depositor when it allowed a sum of RM10m deposited into its account with Maybank to be transferred to one Abhar Capital Holdings Sdn Bhd, D3, that has a trading account with D1 without the authority or instruction from the plaintiff. A trading account is used to, inter alia, purchase shares in the stock market.

[2] The cheque for RM10m was that of the appellant/plaintiff who had made it payable to D1. The plaintiff is a cooperative established on 30 August 2012 under the Co-operative Societies Act 1993, with the aim of, inter alia, carrying out investment and commercial ventures to generate returns for its members of roughly 133,843 members. It was satisfied with the investment proposal of mid-2013 of D2, Lotfi bin Miskam, who held himself out as representing D1 as its officer and that D1 would invest the said sum with attractive returns on the investment.

[3] The plaintiff then received a letter dated 19 August 2013, purportedly from D1 which states that D1's Joint Committee was prepared to consider the plaintiff's involvement in the investment. The sum of RM10m was to be invested for a period of three years commencing September 2013 and would end on September 2016. The investment was slated to achieve a 10.5% profit/dividend annually. The investment would be safe as it would be conducted by D1, a well-known investment bank in Malaysia. This letter turned out to be a forgery.

[4] It turned out that D2 is a fraudster and he was subsequently made a bankrupt and D3, in whose company his sons were directors, had been wound up. D1 does not have any representative or employee in D2 and that there was no such investment scheme with that yield of dividend payout annually.

[5] The plaintiff only found out that it had no investment with D1 after it

A was alerted by the Cooperative Commission and the Securities Commission. D1 said that the cheque of RM10m went into its pool account and D2, with the bank-in slip had instructed his remisier PW2 Encik Zainol Aswan to transfer the funds deposited to D3's account for the purpose of investing in equities.

B

[6] PW2 in turn instructed the Credit Control Department of D1 to process the instruction and the RM10m went into D3's account. So as not to alert suspicion, one payment of dividend was made a few months later but not by D1 but by D3 using a bank draft of RHB Bank.

C

[7] The plaintiff, when it found out that it had been defrauded, sued D1, D2 and D3. The High Court found that D1 does not owe a duty of care to the plaintiff who was not its customer. This appeal concerns only D1 as a judgment in default had been obtained against D2 and D3 had gone into liquidation.

D

[8] The plaintiff had pleaded and argued that D2 was an agent or representative of D1 and as such D1 as the principal is liable for all the representations made by its agent. However, in evidence it was shown that D2 had never been an agent or representative or employee of D1 and that all the purported letters on D1's letterhead had been forged.

E

[9] D1's evidence above was not challenged by the plaintiff in cross-examination and is deemed to have been accepted in line with the principle of law set out in *Ng Siew Lan v John Lee Tsun Vui & Anor* [2017] 2 MLJ 167 at p 180 (FC).

F

[10] Moreover, the plaintiff had also acknowledged in para 25(b) of its amended statement of claim that D2 had used forged documents to influence the plaintiff. We accept the proposition of law that forged documents are void and not binding on the company unless the forger had acted within his ostensible scope of authority. See *Ruben v Great Fingall Consolidated* [1906] AC 439 at p 444 (HL); *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123 at p 125.

G

H

[11] At the appeal before us the plaintiff had focused on the liability of D1 under the tort of negligence. The cause of action in negligence is that D1 owed the plaintiff a duty of care and that it breached this duty when it failed to inquire of proper instructions from the plaintiff before transferring the RM10m to D3 at the oral request of D2.

I

[12] Does D1, a financial institution, owe a duty of care to its depositors whose identities are not obvious to it? We shall explore whether the Investment Bank owes a duty of care to a depositor who is not its customer but whose

money it has allowed to be transferred out to a third party without the depositor's authorisation. A

BEFORE THE HIGH COURT

[13] The learned High Court judge ('HCJ') in the grounds of judgment ('GOJ') took the view that the plaintiff had not proved that the investment was received and managed by D1 (para 22 of the GOJ) and as such D1 does not have a duty of care to the plaintiff. B

[14] The High Court further took the view that since plaintiff was not a customer of D1, there was no relationship legal or otherwise that the investment bank D1 had with the depositor the plaintiff, from which there could arise a duty of care. C

[15] The plaintiff had not opened an account with D1 and therefore cannot expect D1 to owe it a duty of care. Moreover, there are hundreds of deposits everyday into the account of D1 and D1 would be saddled with an onerous duty to have to check whose deposit it is before dealing with it. As there is no duty of care, the issues of breach of duty and causation are not relevant (para 23 of the GOJ). D E

[16] Dissatisfied with the decision of the High Court, the plaintiff as appellant had appealed to the Court of Appeal and the sole respondent is the investment bank. F

[17] So it is back to the drawing board as to whether the respondent ought to be held accountable in law for what was alleged against it, that it wrongfully and without the appellant's authority or instruction, negligently diverted the investment sum of RM10m it received from the appellant into a third party's share trading account in D3, resulting in the RM10m being siphoned off to the detriment of the appellant. G

[18] As for D3, no appearance was entered and so a judgment in default was entered against it. At the time of the trial, D3 had undergone a name change to Tareeq Asset Management Sdn Bhd. H

[19] D2 was a bankrupt and so sanction was obtained for the plaintiff to pursue its claim against D2 and judgment was entered against D2. I

[20] This appeal by the plaintiff as appellant is only against the sole respondent D1, the investment bank. The parties shall be referred to as they were in the High Court as the plaintiff and D1 or the investment bank.

A WHETHER THE INVESTMENT BANK D1 OWES A DUTY OF CARE TO THE PLAINTIFF

[21] There is no need for one to be in a contractual relationship with another before there can arise a duty of care. In fact, the way the law of negligence was first developed in the case of *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 was in the context where there was no contractual relationship between the consumer of the ginger beer that was found to contain a partially decomposed snail and the manufacturer of the ginger beer.

[22] As a corollary where there is a contractual relationship with intricate terms set out with respect to the rights and obligations of the parties, it is unlikely that the court would hold that there is a separate cause of action in tort. Even if there is it would be co-extensive as in cases of a wrongful dishonour of a customer's cheque where it is both a breach of the terms of the contract between a bank and its customer and also in breach of a duty of care in negligence.

[23] The law of negligence is both flexible and versatile where the categories of negligence are not closed and that it is left to the courts to impose a duty of care where the justice of the case demands it with reference to the principle of proximity, foreseeability and policy considerations. The circumstances and complexities of life do not present a straight-jacket application of whether a duty of care should be recognised and much would turn on the circumstances of each case beyond the standard situations that the law is accustomed to whether in the case of motorists on the road or a mishap or a professional rendering his service in a manner that has caused damage to the client.

[24] The versatility of the English common law that we have inherited and in this case, the tort of negligence, allows the courts to be guided by the light of principles from previously decided cases in shaping the law to cater to the realities of modern life. Thus, when deciding to apply the neighbour principle to cover negligent misstatement in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, Lord Hodson said, at p 514:

> I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case.

[25] Lord Devlin, in underscoring the flexibility of the common law to adapt and adopt in meeting the demands of justice in a myriad and multitude of relationships remarked, at pp 529–530:

> I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract.

[26] Finally it is for the court to decide on whether or not there is a duty of care as in a tortious duty in a given factual matrix that may well not sit snugly into the standard pigeonholes of personal injuries, professional relationships, and contractual relationship where the act complained of is in the nature of monies deposited with an investment bank with whom the bank has no contractual relationship.

[27] The House of Lords case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 makes reference to the 'three-fold test' of: (1) harm must be reasonably foreseeable as a result of the defendant's conduct (foreseeability test); (2) the parties must be in a relationship of proximity (proximity test); and (3) it must be fair, just and reasonable to impose liability (policy consideration). This test was popularised by Bingham LJ in the Court of Appeal in *Caparo Industries* case where he confessed as follows:

> It is not easy, or perhaps possible, to find a single proposition encapsulating a comprehensive rule to determine when persons are brought into a relationship which creates a duty of care upon those who make statements towards those who may act upon them and when persons are not brought into such a relationship.

[28] In *Caparo Industries* case the House of Lords held that the auditor who prepared the accounts of a target company, Fidelity plc, does not owe a duty of care to a shareholder like Caparo who had some shares in Fidelity plc and subsequently increased it in reliance on the audited accounts of Dickman, the auditor. It transpired that the accounts showing profits were false and that Fidelity had in fact made a loss. After Caparo Industries had taken control of Fidelity plc, the company was in a worse state than had been revealed by the directors or the auditors. It sued Dickman for negligence in preparing the accounts and sought to recover its losses. This was the difference in value between the company as it had and what it would have had if the accounts had been accurate.

[29] Following the above time-tested approach, our Federal Court in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561 adopted the same stance and held that in order for a duty of care to arise in negligence: (i) harm must be reasonably foreseeable as a result of the defendant's conduct; (ii) the parties must be in a relationship of proximity; and (iii) it must be fair, just and reasonable to impose liability.

[30] This was further reiterated in the Federal Court case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 at pp 587–588 (FC), where the Federal Court opined:

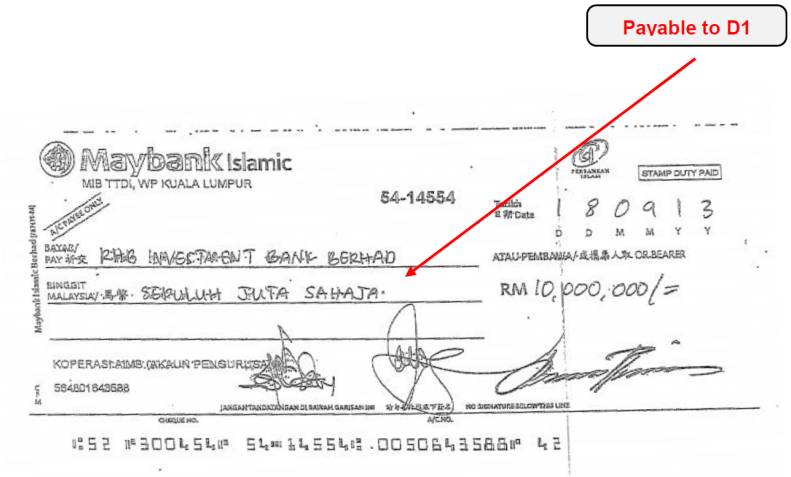
> [115] *For the establishment of a duty of care in tort, the preferred test in Malaysia is the three-fold test of foreseeability, proximity and policy considerations* (see *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561). We

note that the Court of Appeal in the present case did not examine this point. In *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*, this court set out the approach for imposing a duty of care as follows:

> [34] *To put it in a nutshell the preferred test is the three fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence.* The three fold test has been recognised by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp 617–618, His Lordship said that:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that *there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood'* and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. (Emphasis added.)

THE FACTUAL MATRIX

[31] The plaintiff issued a Maybank Islamic Bhd cheque number '300454' (Cheque No 300454) dated 18 September 2013 for the sum of RM10m payable to 'RHB INVESTMENT BANK BERHAD' ie D1. A copy of the cheque is reproduced below:



[32] The plaintiff was induced to do so after the presentations of D2 who had held himself out as representing D1 the investment bank and the assurances given that the investment was safe as all dealings would be with D1. D2 even gave a letter on D1's letterhead confirming the investment leading the

plaintiff to believe they were investing in a so-called 'Equity Fund/Special Issue/IPO fund' with D1 for three years with a 10.5% return per annum.

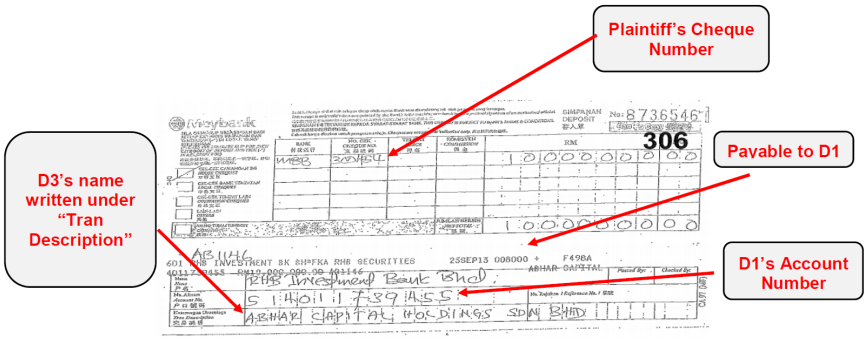
[33] Having no reason to suspect anything amiss the plaintiff had made out the said cheque in the name of D1.

[34] The Cheque No 300454 was deposited on 23 September 2013 into D1's pool account with Malayan Banking Bhd (Maybank) — which is a share trading account with D1 for the purposes of the said investment. The plaintiff prepared a payment voucher dated 23 September 2013 to D1 for the RM10m investment which D2 signed off purportedly as a representative of D1.

[35] A pool account managed by an investment bank contains funds from many individual investors that are pooled together for the purposes of investment. D1's sole witness (SD1), confirmed that the RM10m was deposited into D1's pool account and was therefore within D1's control and possession.

[36] The plaintiff received on 25 September 2013 on D1's letterhead, a confirmation of the plaintiff's investment which contained details of the category, profile, distribution policy, dividend yields and other information of the said investment. The letter turned out to be a forgery.

[37] How then did the RM 10m leave D1's account? Without the authority of the plaintiff, D1 proceeded to channel this RM10m out of its pool account and into D3's account. The transfer of the plaintiff's RM10m from D1's account into D3's account was purportedly done on the instruction of D2, with the assistance of D1's employee (SP2) and its Credit Control Department. In reliance on a 'bank-in slip' which D2 is said to have handed over to SP2 (bank-in slip) as purported proof of the fact that D2 had deposited a RM10m cheque into D1's account. A copy of the bank-in slip is reproduced below.



A **[38]** It was not difficult for D1 to know whose deposit of RM10m it is as the name of the account holder of the Cheque No 300454 was written on the said cheque. Surely the first question D1 should ask itself is whether the depositor has opened an account with D1 for the money, and a huge sum at that, had been deposited into D1's account. D1 would have to satisfy itself as to whether
B it has the proper mandate from the depositor of this sum of RM10m to transfer it out to another third party.

[39] At all material time, the plaintiff had no knowledge of D3, neither had
C it given any authorisation for D1 to channel the RM10m to D3. The Cheque No 300454 was issued to D1 and not D3.

[40] D1's sole and primary witness, SD1, testified that D1 had no knowledge of who prepared the bank-in slip. He conceded that D1 had no
D authorisation from the plaintiff to channel the RM10m to D3. The plaintiff's Chairman (SP1), testified that he had no knowledge of D3 and would not have agreed to the investment if it would be credited into D3's account.

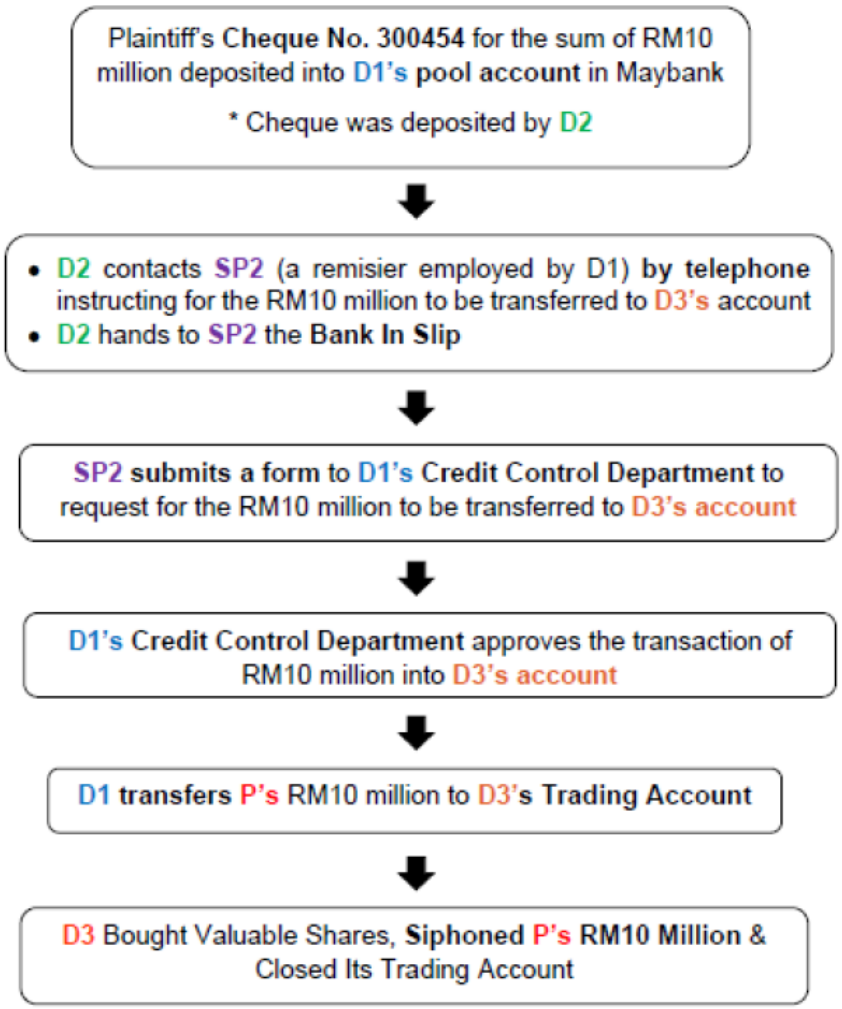
[41] Could D1 foresee that if it acts on an instruction not coming from the
E right person but from an unauthorised person, then the real owner of the RM10m might lose its money altogether? The answer is rather obvious and it is a resounding 'yes'.

[42] What happened subsequently is as alarming as it is unauthorised. After
F receiving the bank-in slip and D2's instructions, SP2 issued a form to instruct D1's Credit Control Department to process the allocation of the RM10m into D3's account. Pursuant to SP2's instruction and processing by D1's Credit Control Department, D1 transferred the RM10m into D3's account.

G **[43]** One thing is clear: before channeling the RM10m into D3's trading account, D1 and/or its officers failed to verify and ascertain whether the plaintiff had in fact instructed D1 to transfer its RM10m into D3's account.

H **[44]** Following to the above, the trading limit of D3's trading account was increased by RM10m. D3 purchased a huge volume of shares, withdrew all its proceeds from the said purchase, and shortly after closed its trading account in D1.

I **[45]** The flowchart below as curated in the written submission of the plaintiff captures the flow of the plaintiff's RM10m:


Plaintiff's Cheque No. 300454 for the sum of RM10 million deposited into D1's pool account in Maybank
* Cheque was deposited by D2
• D2 contacts SP2 (a remisier employed by D1) by telephone instructing for the RM10 million to be transferred to D3's account
• D2 hands to SP2 the Bank In Slip
SP2 submits a form to D1's Credit Control Department to request for the RM10 million to be transferred to D3's account
D1's Credit Control Department approves the transaction of RM10 million into D3's account
D1 transfers P's RM10 million to D3's Trading Account
D3 Bought Valuable Shares, Siphoned P's RM10 Million & Closed Its Trading Account

[46] Before the implosion, there was the usual calm before the storm. The plaintiff received a letter dated 10 February 2014 on D1's letterhead which attached a cheque dated 10 February 2014 amounting to RM73,000. This payment of RM73,000 via a bank draft belonging to RHB Bank Bhd was represented to be dividends from the plaintiff's investment with D1. This letter, as it turned out, was forged.

[47] There was thus nothing to arouse the plaintiff's suspicion that its investment with D1 was not authentic or that it was other than with D1. It was only about a year later, around April 2015, that the plaintiff was contacted by the Securities Commission and was informed that its investment with D1 did

A not exist. This information was conveyed by the Cooperatives Commission of Malaysia to the Securities Commission as a follow-up to the plaintiff's annual reports submitted to the former. On 29 April 2015, the plaintiff handed over all relevant documents to the Securities Commission for purposes of investigation.

B

[48] On 22 February 2016, the plaintiff wrote to D1 to withdraw its said investment, and demanded for the return of the RM10m. D1 by their letter of 13 April 2016 replied that there was no investment by the plaintiff in D1.

C

[49] The plaintiff, realising that it had been scammed, then referred the matter to Bank Negara Malaysia ('BNM') and was advised to file a police report on the authenticity of the said investment, which report was made on 5 April 2016.

D

[50] D1's internal auditor had approached SP2 and informed him that there was a big problem ('masalah besar') in relation to D3's investment. An investigation was conducted and SP2 was suspended. SP2 resigned from D1 thereafter.

E

[51] SP2 was approached by D1's Credit Department and was asked to sign a disclaimer form, stating that D1 would not be responsible for any problems which were caused by third party cheque issues.

F

[52] The investigation found that D3 had utilised third party cheques to channel monies into its account. SP2 was also reprimanded by the Securities Commission for his conduct.

G WHETHER D1 AS AN INVESTMENT BANK OWES A DUTY OF CARE TO THE PLAINTIFF WHO HAD DEPOSITED RM10M WITH IT

[53] It was attributed to Steve Jobs as having said that 'If you define the problem correctly, you almost have the solution'. To put it differently, if you ask
H the right question, you almost always get the right answer.

[54] The question is very simply this: can an investment bank like D1 here, receive a sum of RM10m from someone it says it does not know but then has no compunction transferring the money out into a third party's account merely
I because the third party said it was meant for its account?

[55] Related to the above question is whether an investment bank may deal with the money deposited with it by someone that it says is not its customer and so does not owe it a duty of care?

[56] We are of the view that the moment a sum of money is deposited with an investment bank, the bank must find out whose money it is and whether the depositor is already its customer. If it is not then it should verify who the depositor is and the documents substantiating the customer's identity as well as the relevant resolutions for the opening of an account with the investment bank and who are the relevant signatories of the account.

[57] Whilst the presence of an account certainly establishes the person as a bank customer, it may not be the sole consideration. See *Banking Law* (2nd Ed) by Poh Chu Chai at p 27. In *Tate v The Wilts and Dorset Bank, Limited* 1 LDAB 286, a man asked the defendant bank to cash a cheque for him, and the cheque was drawn in favour of a person under whose name he traded. Notwithstanding that he did not have any account with the defendant, the bank agreed to do so after ascertaining that the cheque would be paid. Darling J held: 'He was not a customer at the moment, but he was going to become a customer if that cheque was collected'.

[58] We agree with the plaintiff that the duration of the relationship is not of the essence in establishing if an entity or person is a customer of the bank. See: *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683.

[59] We accept as the correct proposition of law that the test for breach of the duty of care in the context of banking transactions is whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable. The Court of Appeal stresses that in each fact situation, common sense must prevail. See: *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507.

[60] A bank has to exercise reasonable skill and care in performing banking duties. The standard of the reasonable care and skill to be exercised by a bank towards its customer is an objective standard. A bank has an obligation to guard against facilitation of fraud and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. A banker is required to refrain from executing an order if the banker is 'put on inquiry'.

[61] It is trite that a bank has to ensure that: (i) payment is made with the authority of the customer; and (ii) the person who is being paid is entitled to receive the payment. There is breach of duty of care if a bank makes payment without the customer's authority or mandate. No banking transaction would be safe if a bank flouts that in the name of convenience or no reason to be 'put on inquiry'. In fact, chaos would rule and the integrity of the banking system would collapse. See: *Malayan Testing Laboratory Sdn Bhd v Standard Chartered*

Bank Malaysia Bhd [2010] 9 MLJ 94.

[62] A mandate is an agreement which authorises a bank to pay if given instructions in accordance with its terms. A mandate will typically list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign any given order. See: *Yatin bin Mahmood v Mohd Madzhar bin Sapuan & Ors* [2010] 8 MLJ 647.

[63] We would say that difficulty in ascertaining or verifying the mandate of a depositor is no valid excuse to dispense with it even when there may be hundreds of depositors per day in the investment banker's account.

Duty of care in preventing its facilities from being used to perpetrate fraud

[64] We agree with learned counsel for the plaintiff that SP2 and D1's Credit Control Department, knew or ought to have known of the fraudulent use of its facilities such that non-customers such as the plaintiff could be harmed pursuant to the following:

(a) SP2 relied on a phone call from D2 and an unsigned bank-in slip to transfer the plaintiff's money into D3's trading account, without making further relevant enquiries with regard to the source of the RM10m;

(b) D1's Credit Control Department, which was supposed to ascertain the source of funds, clearly failed to do the same. This is notwithstanding that the bank-in slip made explicit reference to the plaintiff's Cheque No 300545; and

(c) both SP2 and the Credit Control Department failed to ascertain whose Cheque No 300454 it was when it could easily have found out from its bank, in this case, Maybank.

[65] After all D1 had to be satisfied that Cheque No 300545 had cleared before allowing the sum represented by it of RM10m to be transferred out to D3's account.

[66] To accept an oral instruction from a third party to transfer out the funds in D1's account based on what is written on a bank-in slip would be the most dangerous thing for an investment bank to do. To hold that there is no duty of care to a depositor would be to give the green light for egregious element to exploit this weakness arising out of a difficulty in ascertaining who the depositor is.

Duty of care in the light of the anti-money laundering regime

[67] The face of banking has changed in the last 20 years as central banks the world over put in place a strict regulatory compliance on pain of penalties for banks and providers of financial and professional services (reporting institutions) to comply with in their efforts to detect and prevent money laundering and financing of terrorism activities.

[68] We agree with learned counsel for the plaintiff that in an environment where there are strict controls, record-keeping and reporting obligations in relation to money laundering and anti-terrorism activities, statutory and otherwise, on the source and flow of monies, in particular large sums such as RM10m, D1 ought to have been alerted to make the relevant enquiries.

[69] Sections 13 and 14 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') impose on reporting institutions obligations for record-keeping and reporting.

[70] Operating under the new paradigm of the anti-money laundering regime, all reporting institutions cannot now feign ignorance nor take shelter from the old adage that ignorance is bliss. It behoves all reporting institutions not to deal with any substantial sum of deposits without ascertaining who it is from and to act on it only after the various verification documents are in place with respect to the identity of the customer, the source of the funds and the purpose of the funds and the proper mandate on how the funds are to be utilised.

[71] BNM has issued Guidelines on 'Know Your Customer' such that all reporting institutions would have to know whose funds they are receiving and what it would be used for whether they be investments in shares, unit trust and bonds and other instruments. Absent that the investment bank would openly be allowing it to be used as a conduit for money laundering and would have to be held to account by BNM.

[72] D1's own internal auditors had acknowledged that there was a big problem ('masalah besar') and even labelled it a 'third party cheque' issue. It is D1's internal Standard Operating Procedure ('SOP') for complying with BNM Guidelines as well as fraud prevention and detection when dealing with third party cheque.

[73] We agree with learned counsel for the plaintiff that there exists a duty of care owed by D1 towards the plaintiff when it received the plaintiff's cheque of RM10m and thereafter the plaintiff may be regarded as a 'customer' of D1, irrespective of whether any formal contract was entered into. It would be

incongruent with the business of an investment bank if it has received a substantial sum of money of RM10m from a depositor and yet refuses to consider it as its customer but nevertheless arrogates to itself the liberty to deal with the money by transferring it into a third party's account merely on a 'say so' by the third party.

[74] If that is accepted and approved as a practice that an investment bank may be engaged in, then it would open up a Pandora's box for massive fraud to be perpetrated for as D1 itself admits, there are hundreds of deposits each day that it receives from depositors. There would be nothing preventing someone within the investment bank to conspire with a third party to give the third party information on which deposits to supposedly give instruction for transfer of the deposits to the third party.

[75] All along the plaintiff was labouring under the impression that the sum of RM10m was for the investment bank to invest prudently to give a reasonable return to its customer. The cheque was thus made payable to D1 as the investment bank for it to make investments on behalf of the plaintiff and not to be transferred out to a third party.

[76] We cannot accept that D1 owes no duty of care to the depositor in the circumstances of this case. Both the demands of proximity, foreseeability and policy would constrain us to hold that there is a duty of care.

Duty of care to a non-customer/client by a provider of professional services

[77] It is a misnomer to say that a provider of professional service such as that of an investment bank cannot under any circumstance owe a duty of care to a non-customer. Even in the field of legal services, lawyers under certain circumstances may be found to be liable to a person who is not their client. A solicitor can be imposed with a duty of care to a non-client. See *Al-Kandari v JR Brown & Co* [1988] QB 665 and *Gran Gelato Ltd v Richcliff (Group) Ltd and others* [1992] Ch 560 and *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476 at paras [112]–[121].

[78] Learned counsel for D1 sought to extract this principle from the Federal Court case of *Pushpaleela* that a one does not owe a duty of care to someone who is not one's client. That was in the context of whether the solicitors for the purported seller of a piece of land who turned out to be a fraudster, owes a duty of care to the real owner.

[79] It is understandable that all that a solicitor can do is to verify the identity of the person who said he is the registered owner by checking his identification card and the land title to see if the name matches that of the issue document of

title produced by the purported client. There must at least be the rudimentary and basic duty of ascertaining that the person in front of the solicitor who said he is the registered owner of the land is the right person as far as the documents can confirm.

[80] In *Pushpaleela*'s case the solicitors for the fraudster had verified the identity of the Indian National whose name is identical to that of the real registered owner of the land and that there was a proper statutory declaration by the fraudster notarised in India stating the replacement of the lost passport of the fraudster. There was nothing more that the fraudster's solicitors could do and they had no knowledge of the identity of the real registered owner.

[81] Fraudsters are cunning and crafty enough not to arouse suspicion by making sure that the identification documents produced are on the face of it reflective of the one who produced the documents as the registered owner of the land in question.

[82] It would be different if the solicitor acting for the vendor did not even ask for the verification of the identification card of the vendor nor have the vendor sign the documents in his presence. It must be appreciated that the purchaser's solicitors would not be able to verify that the vendor is who he said he is — the registered owner of the land in question. He relied on the vendor's solicitors verifying from the documents ordinarily relied on for proof of identity.

[83] Likewise a vendor solicitor who released the balance purchase price to the vendor before the title is presented for registration in the purchaser's name may be liable in negligence if the express instruction from the purchaser's solicitors is that the balance purchase price is only to be released to the purchaser after presentation of the title for registration at the land office and a search just before presentation of the transfer documents showed no encumbrance or caveat on the land in question.

[84] So too a purchaser's solicitors who presented the title for registration in the purchaser's name without ensuring that the balance purchase price had been deposited with it as stakeholder and when the vendor discovered that he had not been paid, it was realised too late that the land had been transferred out to a bona fide third party. See generally the Supreme Court case of *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116.

[85] Thus *Pushpaleela* is not proposition for the law that a solicitor can never ever owe a duty to a party to a transaction who is not his client. The particular and peculiar facts of each case would have to be examined from the perspective

of foreseeability, proximity and policy consideration.

[86] It would be stating the position of the law too narrowly and rigidly to conclude that under no circumstance may a solicitor be liable in negligence to a party that is not his client.

[87] The following passage from Jackson and Powell on *Professional Liability* (8th Ed, Sweet & Maxwell) would be sufficient to debunk this misconception. It traced the development of the law here with respect to extending a duty of care to being owing to a third party who may not necessarily be the solicitor's client as follows:

> (i) General
>
> 11–043
>
> *The general law*. The starting point is *Hedley Byrne Co Ltd v Heller Partners Ltd*, which established liability for negligent misstatements relied upon by claimants. Since then, there has been considerable uncertainty about the test to be applied for determining whether a duty of care is owed to third parties. One approach has been the 'tripartite test' developed in *Smith v Bush*, *Caparo v Dickman*, *Spring v Guardian Assurance Plc* and *Marc Rich Co v Bishop Rock Marine Co Ltd* of foreseeability, proximity, and whether it is just and reasonable to impose a duty of care. Side by side with this general test, as a result of *Murphy v Brentwood DC,* the courts have adopted an incremental approach from decided cases. Following this approach, *Hedley Byrne* has been interpreted as imposing liability when there has been a voluntary assumption of responsibility, and this was applied by all of the House of Lords in *Henderson v Merrett Syndicates Ltd*, a minority in *Spring v Guardian Assurance Plc*, a majority in the solicitor's negligence case of *White v Jones*, and all their Lordships in *Williams v Natural Life Ltd.'*

[88] The learned editors of *Charlesworth & Percy on Negligence* (14th Ed, 2018, Sweet & Maxwell), sketched the development of the law with respect to a solicitor's duty to a third party as follows:

> 10–235
>
> *Duty to third party in tort* Prior to 1963, except in cases where a solicitor was liable as an officer of the court, it was generally considered that no duty of care was owed to a person who was not a client. Although not recognised at the time, the first erosion of this principle had actually taken place with the decision in *Donoghue v Stevenson.* Then, in 1963, with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, a wider principle emerged. A solicitor who, upon request, gave advice or information negligently, whether gratuitously or not, to a non-client, and had reason to believe that the advice or information would be acted upon, could well be liable, in the absence of clear disclaimer, for loss or damage suffered in consequence.
>
> > Nowadays ... it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who

> he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. *The essence of this proposition, however, is the reliance … The professional man must know that the other is relying on his skill and the other must in fact rely on it.* (Emphasis added.)

[89] Thus in *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors* [2002] 2 MLJ 532, His Lordship Charles Ho J held that a solicitor who drafted the sale and purchase agreement on behalf of a developer owed a duty of care in tort to a purchaser who had been directed by the developer to see the said solicitor to sign the SPA as follows at pp 549–550:

> In the case of *Hedley Byrne & Co Ltd v Heller & Partners* [1963] 2 All ER 575, the liability of a professional person, apart from the confines of a contract for services, was debated at length in the House of Lords. The following statement of principle extracted from the headnote is distilled from the opinions of the five Law Lords in that case:
>
> > If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results.
>
> This case imposes a burden of care on a professional person quite independent of contract for negligent or untrue statements. In the instant case, the plaintiff relied on the sale and purchase agreement drafted by the fourth defendant that stated that the property was free from encumbrances. I think the plaintiff was entitled to rely on the representation in the agreement as the fourth defendant was an experienced law firm handling property conveyancing. It is immaterial whether the fourth defendant acted for the plaintiff as well. The representation was false and the plaintiff suffered loss. If the fourth defendant had not falsely stated that the title to the property was clean, when in fact it was heavily encumbered, it is probable that the plaintiff would not have proceeded to execute the agreement. I therefore think that the fourth defendant is liable on this ground alone.

[90] On appeal the Court of Appeal in *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359 affirmed the said application of the law to the facts and held as follows:

> [25] Having considered the matter, we came to the conclusion that the learned trial judge had rightly come to his finding that in the circumstances the second appellant had been in breach of his duty as solicitor of the respondent under the implied retainer.

LIABILITY IN NEGLIGENCE

[26] Apart from his liability under the retainer, the learned judge in the alternative found the second appellant liable to the respondent in tort on the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. He held that the second appellant is liable in negligence to the respondent in making the wrongful representation in the SPA, that the subject property was free from any encumbrance, which was not true. Had it not been for this representation, the respondent would not have proceeded with the purchase of the subject property at all. By giving the wrong representation in the SPA, the second appellant had thereby induced the respondent to act to his detriment.

[27] The learned judge further held the second appellant is liable in tort on the direct application of the neighbour principle in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562. *In Ross v Caunters* [1980] 1 Ch 297, *Megarry J held that 'a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identifiable third party owes a duty of care towards that third party in carrying out that transaction'*. In the present case, we agree with the learned judge that the second appellant in failing to secure the redemption agreement on behalf of the end financier would expose the respondent to the risk of losing the subject property in the event of a foreclosure being taken by the chargee, as had happened here. Further, *PW4, in his testimony stated that it is a standard conveyancing practice for solicitor acting for end financier to enter into redemption agreement with the chargee in order to protect the interest of the end financier. The second appellant failed to do just that. This had caused resultant loss on the respondent. On the evidence before us, we hold there is sufficient proximity between the second appellant and the respondent as to render the second appellant liable to the respondent for his omission to take the necessary measure to secure the redemption agreement from the chargee.*

[28] For the above reasons, we upheld the decision of the learned judge on the issue of liability as against the second appellant. (Emphasis added.)

[91] The least the investment bank can do is to allow the substantial sum of RM10m received in a single cheque to remain in its account until it can ascertain whose it is and for what purpose it had been so deposited. If it has to mobilise its manpower to do that, it may well want to impose a fee on the depositor for the dissipation of time and energy in verifying whose money it is that has come into the common pool of monies deposited into its account each day.

[92] If the investment bank is not keen to do the business that the depositor thought the investment bank would be doing, then the sum deposited should be returned to the depositor. Generally, the name of the depositor would appear in the cheque deposited for the cheque would bear the drawer's name.

[93] We cannot accept the submission of learned counsel for D1 that D1 could not be expected to take into account the interests of the plaintiff whom D1 did not even know existed much less had any knowledge of the dealings

between the plaintiff and D2 or that the plaintiff had given a cheque to the D2 to deposit. If that be true then it would be a perfectly valid argument for D1 to deal with the sum deposited as it likes including investing it without the need to have to account for it.

[94] Taking D1's argument to its logical conclusion it does not matter who it transfers the sum deposited to because it owes no duty to the stranger depositor with whom it does not have a contractual relationship to begin with. If that be so, it may as well transfer the sum deposited to one of its staff for the staff to do as he likes. Surely that would be too alarming and astounding a proposition!

[95] Every professional firm or company that is accustomed to receiving money from its clients or prospective clients or from any unidentified depositors would not be so bold as to say that for so long as it does not know the depositor it is at liberty to do as it likes with the money without having to account for it.

[96] To accept D1's position as espoused by its learned counsel that it may transfer the funds out because a third party's name is stated in the bank-in slip under 'Tran Description' would be to open the floodgate wide not just for money laundering activities but also to allow the investment bank common pool account to be a cesspool for fraud merely because it is difficult to ascertain who the depositor is.

[97] To hold that there is no duty of care when it is prepared to allow cheques for investment purpose to be deposited into its common pool account would be harmful and dangerous for the financial system and for bona fide investors who labour under the impression that they are investing with a licensed investment bank because they have made their cheques payable to the investment bank.

[98] In the light of the anti-money laundering regime the case of *Abou-Rahmah and another v Abacha and others* [2006] 1 All ER (Comm) 247 at pp 262–263, must be confined to its own particular and peculiar facts. There the Queen's Bench Division held that the bank there did not owe a duty of care to the claimants who were also not customers of the bank. The UK Court of Appeal affirmed the decision in *Abou-Rahmah*'s case in [2007] 1 All ER (Comm) 827 (CA).

A WHETHER THERE WAS A BREACH OF THAT DUTY WHEN THE INVESTMENT BANK D1 ALLOWED THE RM10M TO BE TRANSFERRED TO A THIRD PARTY D3

B *Breach of a duty of care in allowing the bank's facilities to be used for fraudulent purpose in the anti-money laundering regime*

[99] The security of any system is as strong as its weakest link. Here there were two guardrails within D1 to prevent fraud in circumstances where monies of third parties are paid into D1's pool account, namely: (i) SP2 (D1's employee); and (ii) D1's Credit Control Department.

[100] D1, having received the RM10m in its common pool account, must ask itself whose money it is and what is it for. After all it is a third party cheque and not that of D3. The current anti-money laundering regime would also require D1 to ascertain the source of the funds.

[101] If the depositor is not a customer of D1 yet, then a proper contract would normally be signed so as to ascertain who is or are properly authorised by the plaintiff to give instructions to D1. Nothing was done in this case and D1, acting on the instruction of D2, allowed the RM10m to be transferred to D3 simply by acting on the strength of the bank-in slip that disclosed under 'Tran Description' the name of D3 at the bottom of it.

[102] The words 'Tran Description' probably mean 'Transaction Description' as suggested by the Bahasa Malaysia words 'Keterangan Urusniaga'. A 'Tran Description' does not constitute an instruction for D1 to act on the directions of D2 or D3.

[103] D1 said it has nothing to be suspicious about the transaction and was not put on inquiry. We are not persuaded as D1 cannot accept a deposit from a prospective customer and transferring it to D3 without verifying that the depositor intends the funds to be so transferred to D3.

[104] D1 said that there are just too many transactions daily for it to check. That makes it more imperative that D1 should check so as not to allow itself to be used as an instrument of fraud by fraudster who are bent on exploiting the weakness link in D1's SOP when dealing with transfer of funds from a third party cheque.

[105] The imperative is even all the more when D1 is subject to the anti-money laundering regime where it needs to report on the source of funds of its depositors especially if it is a substantial amount as is the case here.

[106] In fact, it was D1's Internal Audit Department that had picked this up and inquired further of the non-compliance by the Credit Control Department and PW2 Zainol of the SOP to follow whenever dealing with a cheque from a third party. D1 had further exacted from PW2 a letter of indemnity to indemnify D1 against all losses. PW2 was suspended and he later resigned. He was also reprimanded by the Securities Commission as a remisier.

[107] The difficulty of ascertaining who had deposited the RM10m is not a good excuse for not verifying the so-called instruction to transfer the funds. This court cannot allow a situation to persist where any fraudster can simply walk into the office of D1, an investment bank and said 'Transfer the monies to my account' as the bank-in slip has the name of the customer to transfer the monies to. That would open up the investment bank to be used as an engine of fraud on the depositors.

[108] D1 was aware of the problem with third party cheques and so there was a need to inquire into whose cheque it was and whether there is an instruction to transfer of its fund to D3.

[109] D1 said that it would be imposing too heavy a burden on D1 who daily would have to deal with many amounts deposited into its common pool account. Difficulty is no excuse for not exercising proper duty of care to ensure that a depositor's monies are not improperly transferred out.

[110] To approve the action of D1 with respect to a third party cheque would be to open the floodgates to all fraudsters to just inquire from someone inside D1 which are the funds each day that are in the common pool and then to give the instruction to transfer the monies to another account within D1 for another customer.

[111] Going by the argument of D1, even an office boy who banks in the cheque would then be able to write any name of a client of D1 and that would be enough for D1 to act on the instruction. That would be alarming and fraudster would have a field day in perpetrating their nefarious act with the cooperation or the turning a blind eye of someone in D1.

[112] We therefore cannot agree with D1 that it is not factually foreseeable here that D1 might cause loss to the plaintiff merely because the plaintiff was not D1's customer.

[113] We also cannot agree with D1 that there is no sufficient legal proximity between the plaintiff and D1 here for a duty of care to arise, especially in a claim for pure economic loss like in *Pushpaleela* and here. The proximity lies in the fact that the sum deposited is sitting in the account of D1 and it will remain

safely there unless and until D1 decides to act on it after ascertaining the purpose for which the money deposited had come into its account. D1 can still at that stage after the plaintiff's cheque had cleared, declined to accept the plaintiff as its customer, though it would be very rare for the investment bank to do so simply because however badly the yield is ultimately arising out of the investment made, the investment bank would still get its fees based on the amount managed by the investment bank.

[114] D1 declared with an air of confidence that it had never assumed any responsibility to the plaintiff. Not wanting to assume responsibility does not mean that it has the license and liberty to act irresponsibly to a depositor who generally would not be depositing any sum with an investment bank because it has too much money to keep in its own account. Is the investment bank saying then that it has the right to convert the RM10m for its own use because it thought it is its own money or that it had not asked for that sum to be deposited with it? The answer is obvious. It is both an audacious and unacceptable banking practice.

[115] Whilst it may be true that D1 has not assumed any responsibility to the depositor, the matter does not end there. D1 would have to follow up with an action consistent with its non-assumption of responsibility towards the plaintiff depositor. After all, it is D1 as an investment bank that had opened up its account for customers and potential customers to deposit money for investment into its account for it to manage for a fee, irrespective of whether the returns would be positive or negative. That is the very nature of its business. At the very least D1 must return the sum deposited to the depositor after charging whatever is its fees for having to do additional work of verification of the depositor with whom it does not want to establish a contractual relationship.

[116] Learned counsel for the investment bank further submitted that policy-consideration wise, to impose a duty on D1 would require banks to assume their customers are acting deceitfully and having to verify the origin of every deposit received that they were moneys properly belonging to the customer. We have difficulty following that line of argument. It has been banking business from as long as there were banks that monies coming into an account cannot leave that account and be paid to someone else without a proper mandate.

[117] The mandate is generally in the relevant resolutions expressly authorising who are the signatories of the instruction to the investment bank. There is no need to assume any prospective customer or even existing customer to be acting deceitfully for it is a matter of being satisfied that there is proper mandate for the instruction to transfer the funds out. If the investment bank

considers that verifying the mandate is too tedious a task then the investment bank would have to take the risk of being sued for acting without proper mandate and causing the foreseeable loss to the customer.

[118] We cannot fathom how it could be naturally impossible for a bank to verify who had deposited any sums of money with it. Those with an account with the investment bank would have an account number with the investment bank. While investment banks may receive large number of deposits from customers everyday which the customers themselves deposit directly and which it has no control over, there is no need to act on any instructions to pay out unless and until the proper verification of the identity of the depositor.

[119] We are not persuaded that this would amount to imposing a duty of care on the investment bank to the entire world, customers or not customers. All it needs to do is to shift the burden to the depositor to apply to court for an order that the monies deposited is theirs or alternatively if there are competing claims, the investment bank may take out an interpleader summons for the court to make an order as to who is the rightful owner of the funds. Far be it for the investment bank to have the audacity to transfer the amount deposited to a third party who comes forward and tell the investment bank that the monies are meant for the third party. That cannot be right and would set a very dangerous precedent for all who want to launder money to do what D2 did.

[120] Learned counsel for D1 cited the case of *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134 at p 142 (FC), where the Federal Court cautioned against imposing onerous duties on banks to enquire into transactions which they are not a party:

> [15] ... It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce. On this point Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300 in delivering the judgment of this court cautioned at p 328 (MLJ); p 313 (CLJ) as follows:
>
> > ... a commercial Judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.

[121] Surely the Federal Court could not have meant by that dicta to brush aside the need for the necessary mandate to be complied with before allowing funds deposited to be paid out to a third party.

[122] The following observations of circumstances under which a bank may be liable for negligence from the Canadian case of *Semac Industries Ltd v*

1131426 Ontario Ltd [2001] OJ No 3443 (SCJ), referred to us by learned counsel for the plaintiff, have been helpful in our finding of a duty of care in the factual matrix of the instant appeal:

(a) although the common law imposes no duty to rescue a stranger, banks are the focal point of the commercial operations of our society. They are paid for the services they provide and generally enjoy good profit margins;

(b) they operate in a regulated environment where there are relatively few participants. In return for these privileges they *should owe a duty to those who are asked by their customers to deal with them to not knowingly permit their facilities to be used for fraudulent purposes* (see para 65) (Emphasis added.);

(c) at the time of becoming aware of the use of its facilities for a fraudulent purpose the *proximity and foreseeability of harm necessary for negligence arises*; (see para 65) (Emphasis added.); and

(d) if a bank knows of the customer's fraud in the use of its facilities or *has reasonable grounds for believing* or is put on its inquiry and fails to make reasonable inquiry, *the bank will be liable to those suffering a loss from the fraud* (see para 66). (Emphasis added.)

[123] We are satisfied that there was a breach of the duty when D1 did not check with the plaintiff on the so-called instruction to transfer the funds deposited of RM10m to D3.

[124] A reasonably prudent investment bank having received the sum of RM10m from a depositor would act in a commercially acceptable way to verify the identity of the depositor, the purpose of the deposit and instructions with respect to the deposit of the substantial sum of RM10m. Thus, in *Niru Battery Manufacturing Co and another v Milestone Trading Ltd and others* [2002] 2 All ER (Comm) 705 at p 741, Moore-Bick J held:

> [135] ... I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the Claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made. Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. This applies as much to a banker who receives a payment for the account of his customer as to any other person: see, for example, the comment of Lord Mersey in *Kerrison v*

Glyn, Mills, Currie & Co (1912) 81 LJKB 465 (HL) at p 472 ... A

[125] We further agree that there was a breach of this duty of care on the part of D1 when it channelled the plaintiff's RM10m into D3's trading account without due care and regard for the plaintiff's instructions. There was no mandate by the plaintiff to pay out its RM10m to D3. D1 is vicariously liable for the acts of SP2 and its Credit Control Department. D1's breach of its duty of care undoubtedly caused the plaintiff to suffer the loss of RM10m or such lesser amount after taking into consideration the 'dividends' it received. B

C

Breach of a duty of care and non-compliance with one's own standard operating procedure

[126] SP2, Encik Zainol Aswan bin Muktar, was a key witness for the plaintiff. He was employed as a remisier in D1 and had worked for D1 for three years. SP2 managed the trading accounts of both D2 and D3 in D1. SP2 gave extensive evidence on the flow of monies as set out in the flowchart above. D

[127] D2 had after banking in the Cheque No 300454 approached SP2, his remisier at D1, and then handed over to SP2 the 'bank-in slip' from Maybank ('bank-in slip') as purported proof of the fact that D2 had deposited a RM10m cheque into D1's account. SD1 testified that D1 had no knowledge of who prepared the bank-in slip. E

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[128] After receiving the bank-in slip and D2's instructions, SP2 issued a form to instruct D1's Credit Control Department to process the allocation and transfer of the RM10m into D3's account.

[129] Very simply but rather shockingly, based on the bank-in slip alone, D2 instructed SP2 to channel the RM10m from D1's pool account to D3's trading account! Thereafter things happened in quick succession, consistent with the action of a mastermind to escape with the loot as soon as possible without arousing suspicion and risking detection. The share trading limit of D3 with D1 was increased by RM10m and shares were purchased and disposed of and the monies taken out and the account closed. G

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[130] More importantly, SP2 also gave evidence on D1's internal banking procedures which SP2 and D1's Credit Control Department ought to have adhered to, namely: I

(a) SP2 was supposed to verify in a form to be submitted to the Credit Control Department that it was D3 that deposited the RM10m into D1's pool account; and

A (b) D1's Credit Control Department was thereafter supposed to ascertain whether the source of funds belonged to D3 as stated in the bank-in slip.

[131] D1 (through SP2 and the Credit Control Department) failed to comply with the above mentioned procedures. SP2 further testified the following investigations were commenced by D1's auditors which ultimately found that a 'third party cheque' had been used to fund D3's trading account. It was thus plain that D1's two guardrails had failed to verify the source of the RM10m.

[132] SP2 was asked by D1 and did sign a letter of disclaimer absolving D1 of liability in respect of this transaction. Evidently, there was an error committed by SP2 and D1 anticipated its exposure to liability. Whilst this is not conclusive of D1's negligence, it nevertheless revealed that D1 was conscious of a possible finding of liability for allowing the plaintiff's money to be transferred out to a third party account without any authorisation or mandate by the plaintiff.

[133] SP2 was reprimanded by the Securities Commission in respect of this transaction. Again, whilst this is not conclusive of liability of D1, it was nevertheless a relevant factor to be taken into consideration in determining if D1 had been negligent.

[134] There is a clear breach of the investment bank's duty of care to its depositor when its own SOP put in place both to avoid fraud and to comply with the requirements of the anti-money laundering regime are flouted in total disregard of the depositor's interest.

Breach of a duty of care and the lack of mandate/authority to transfer the RM10m to a third party account

[135] D1, as an investment bank, can only deal with third party monies deposited into its account upon the requisite mandate/authority. This is irrespective of whether the monies belong to a customer/account holder or otherwise. When it deals with the monies deposited without the express authority of the depositor it is negligent in so doing.

[136] The authority to deal with the monies deposited must proceed from the owner of the funds deposited. The mandate must be signed by the authorised signatory. If the depositor does not have an account with the investment bank then it is for the investment bank to require of the depositor to first open an account with it and a contractual relationship established with respect to how the account is to be operated and who are the authorised signatories. Otherwise, it would risk its facilities being used by fraudster to perpetrate fraud and launder ill-gotten gains.

[137] If the plaintiff had wanted D3 to do its investment instead of the investment bank, it would have issued a cheque in D3's name instead of in D1 the investment bank's name. In this case, the plaintiff was lulled into writing the Cheque No 300454 in the name of D1 thinking that all is safe, not knowing that the funds would soon thereafter be transferred out to D3 and then siphoned off and D3 going into liquidation.

[138] One thing is clear even if it did not open an account with D1 — it did not authorise the transfer of the RM10m to D3, a third party it does not know and with whom it has no dealings.

[139] A proper mandate is basic in the opening of any account with an investment bank for purposes of investment and if that is absent, one wonders how the investment bank would be able to deal with the funds deposited.

[140] A passage from *Paget's Law on Banking* (15th Ed) at p 696 would suffice, though in the context of a mandate with respect to cheques issued for withdrawing monies standing to the credit of one's account with a bank, must be signed by the authorised person.

> 33.1 Paget's Law on Banking (15th Ed.) defines a mandate as follows: *'Typically a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign any given order*. Some mandates require orders to be signed by A and by any one of B, C and D. Others require the signature of any one of E, F and G and any one of H, I and J. There are many other possible combinations. A bank which acts in accordance with its mandate is duly authorised, and will be entitled to debit the customer's account in the amount of the payment ...

[141] Moreover, as decided in *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 at p 173, instructions to the bank must be clear and unambiguous. In *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 1 WLR 642, the court held that if there is ambiguity in instructions given to the bank, it may well be right (especially with the facilities of modern communications available to him) to have such instructions clarified by the customer, if time permits, before acting upon them.

[142] SD1 (D1's sole witness) conceded that there was no authorisation by the plaintiff for D3 to manage the RM10m. D1 was unable to point to any document or instruction from the plaintiff authorising D1 to transfer the RM10m into D3's trading account or even for D3 to manage its RM10m.

[143] Learned counsel for D1 argued that the bank-in slip is an express instruction from the plaintiff to transfer the funds to D3 for D3 to manage its

investment. To begin with, even D1's witness, SD1, did not treat the bank-in slip as an authorisation to transfer the RM10m to D3.

[144] A bank-in slip is, after all, a document that evidences a deposit bank-in of funds into an account. It would follow that a bank-in slip is not a mandate or authorisation to transfer out funds. It is after all an unsigned document. It cannot give instructions to the bank receiving the cheque other than that the amount represented in the cheque is deposited into the account of the payee of the cheque with the bank (Maybank) if there are sufficient funds in the drawer's account.

[145] Some banks in other jurisdictions like the United States would just have a cheque deposit box for you to drop the cheque for clearance by the bank. Our own banking technology has now developed such that you just have to use a cheque deposit machine commonly referred to as an ATM to bank in the cheque into the account of the payee of the cheque and for the comfort of the depositor, an image of the cheque on a thermal paper would be generated by the cheque-deposit ATM machine for evidence that you have so deposited the cheque for clearance.

[146] We agree with learned counsel for the plaintiff that, in any event, in the present case:

(a) there is no evidence that the plaintiff filled up the bank-in slip. In fact, D1's witness (SD1) testified that D1 had no knowledge who filled up the bank-in slip;

(b) the bank-in slip specifically referred to Cheque No 300454 for the sum of RM10m as being payable to D1 ie 'RHB investment bank Berhad' with D1's account number stated therein; and

(c) the bank-in slip only referred to D3's name in a box entitled 'Tran Description'.

[147] By no stretch of the imagination and ingenuity can the bank-in slip amount to a mandate or authorisation by the plaintiff to transfer its RM10m to D3.

[148] The mere fact that the bank-in slip makes reference to D3 under 'Tran Description' does not mean that D1 had the authority to transfer the plaintiff's RM10m to D3, and D1 could thereafter absolve itself from liability. If it were otherwise, anyone doing banking-in would be able to write the name of any company in the 'Tran Description' box and lo and behold, the funds would then be transferred out to the company named in the said box! No deposit even by way of a crossed cheque into the name of the payee would be safe.

[149] It is telling that the 'third party cheque' issue was uncovered by D1's internal auditors and referred to as 'masalah besar' is precisely an issue of lack of authority.

[150] Learned counsel for D1 submitted that there is no blanket requirement for a bank to enquire on each and every transaction. This would simply be impractical if not impossible. A bank is only required to enquire if it is 'put on inquiry' on any particular transaction. However here we are talking about something more basic which is the proper mandate to be given by the depositor before the investment bank acts on the instruction of a stranger to the transaction to have the sum deposited to be transferred to a company controlled by the stranger.

[151] It is that kind of elementary inquiry by D1 before allowing the money banked into its account to be transferred out as it must be fully conscious that if it does not do so, the monies may be fraudulently transferred out. In *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507 at pp 518–519 (CA), the Court of Appeal recognised the duty of a bank to guard against the facilitation of fraud and to protect its customer and innocent third parties as follows:

> [26] The law should not impose too burdensome an obligation on bankers which may hamper the effective transaction of banking business unnecessarily. *On the other hand, the law should guard against the facilitation of fraud and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties*. An appropriate line of balance must be drawn. The compromise was clearly established in the case of *Barclays Bank Plc* adopting an earlier principle laid down in *Lipkin Gorman* as follows:
>
> > In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that *a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company.* And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard. Indeed, the evidence of Mr Redhead, a most experienced banker, showed that the principle which I have stated is the very criterion usually applied by bankers. He used the language of *a banker being put on inquiry*. (Emphasis added.)

[152] D1 submitted that it had no reasonable grounds to believe that the transaction here was an attempt to misappropriate funds of the plaintiff. There is no need to venture there because all that D1 needed to concern itself is proper mandate. Once there is no mandate, the matter ends there. The sum deposited has to be returned to the depositor if D1 and the plaintiff fail to agree on the

terms of the opening of the account and the investment of the substantial fund of RM10m with the rate of return represented.

[153] If D1 is keen to manage the funds of the plaintiff, then before it does so the terms for opening and operating the account have to be agreed together also with the projected or promised returns if any and also whether the principal is protected.

[154] Learned counsel for D1 seemed to see as relevant that it was D2 that had banked in the plaintiff's cheque into D1's account with Maybank. We do not think who did the banking-in is important for the cheque is crossed in favour of D1 and so whoever banked in the cheque, the sum represented by the cheque would be deposited into D1's account. An office boy may be the one who physically banked in the cheque.

[155] The bank-in slip cannot be read as an instruction given to D1 to transfer the funds out to D3. If the cheque is meant for D3 then it would have been written in D3's name as the payee. It is not difficult to imagine that anyone can write the name of D3 in the box referred to as 'Tran Description' and even its account number AB1146 and the name of D3 printed by the collecting bank (Maybank) on the bank-in slip.

[156] Learned counsel for D1 said there was nothing in the bank-in slip to put D1 on inquiry that something may have been amiss. If by that is meant that D1 can safely receive that sum of money deposited, then we are in agreement. If by that is meant that D1 can safely transfer the whole sum out to a third party who did the physical act of banking in the cheque then we cannot agree.

[157] It does not matter if such a transaction would occur everyday in an investment bank where a customer deposits moneys into the pool account and then provides the bank-in slip to D1 as evidence of the deposit made for its account. There is no good reason why any sum of money meant for D3 should first be deposited into D1's account. A wrong done repeatedly and a risky practice applied many times by an investment bank to allow a transfer out of funds deposited into its account to a third party based on what is written on a bank-in slip cannot make such a practice right.

[158] Learned counsel for D1 cited the Federal Court case of *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457 at p 481 (FC) where it was observed as follows:

> [78] It is pertinent to point out that *it is not incumbent on the respondent, as a bank, to ascertain the source of monies which customers bring into the bank* (see *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134 at p 142;

[2011] 7 CLJ 909 at p 920). Here, *there is no evidence that at the time of the set off the respondent was aware that the monies in the FD accounts were declared as trust monies by the Singapore judgment, let alone was it aware that the said monies were from bribes*. I therefore make a finding that the respondent was a bona fide recipient for value without notice. (Emphasis added.)

[159] Here we are not talking about the source of the funds for it is not disputed that the cheque had been drawn from the account of the plaintiff, a cooperative, with Maybank Islamic and so we are not dealing with a questionable source of funds.

[160] Learned counsel for D1 further argued that the misappropriation of the plaintiff's funds by D2 was made possible only because the plaintiff chose to give its cheque to D2, instead of the plaintiff depositing it directly and completing the bank-in slip themselves, and then dealing with D1 directly by producing the bank-in slip.

[161] Mandate-wise we are of the considered view that D1 had no authority or mandate from the plaintiff to transfer the RM10m to D3, and ought to be liable in negligence to the plaintiff when the said transfer was done unlawfully and in flagrant disregard of any mandate from the plaintiff with the result that it now becomes irrecoverable.

Breach of a duty of care and whether the plaintiff would have allowed D3 to manage the investment sum anyway

[162] The plaintiff's Chairman and its first witness, A Manafi bin Husin (SP1), testified that he had no knowledge of D3 and would not have agreed to the investment if he was told that the investment money would be credited into D3's account. The plaintiff's Board of Directors had agreed and was ready to make the investment because it trusted that the investment would be managed by D1, and not any other party.

[163] However D1 sought to rely on a letter issued by one 'Koperasi AIM Berhad' to D1 dated 25 February 2015 which states that: 'Pihak Koperasi AIM Berhad mengesahkan menerima kebenaran kepada pihak Abhar Capital Holdings Sdn Bhd menguruskan dana tersebut bagi pihak koperasi untuk tujuan pelaburan'. See letter dated 25 February 2015 in encl 4/PDF p 125.

[164] We would agree with the submission of learned counsel for the plaintiff that 'Koperasi AIM Berhad' refers to Koperasi Kakitangan, which is a separate entity from the plaintiff. The plaintiff is known as 'Koperasi AIMB', not 'Koperasi AIM Berhad'. SD1 confirmed in cross-examination that D1 had

indeed mixed up the identities of the plaintiff and Koperasi Kakitangan, and had conceded that the said 25 February 2015 letter was not issued by the plaintiff.

[165] In any event, the said letter was dated 25 February 2015, which is two years *after* Cheque No 300454 was issued in 18 September 2013. It was therefore plain to all that at the material time in 2013, there was no such letter of authorisation.

[166] We find that there has been a breach of the duty of care by D1 as the investment bank in accepting the sum of RM10m from the plaintiff and in transferring it out to D3 in the circumstances of the case which particulars of negligence and surrounding evidence as summarised by learned counsel for the plaintiff are as follows:

(a) D1 relied blindly and solely on the bank-in slip to allocate the RM10m which belonged to the plaintiff into D3's trading account, without conducting any further enquiries;

(b) D1 even conceded it had no knowledge as to who prepared the bank-in slip. It is simply unacceptable that an investment bank accepts instructions on a bank-in slip to transfer a sum of RM10m without knowledge of who prepared the same;

(c) D1 relied blindly and solely on D2's oral representation that he had banked in RM10m to D1 for the purposes of channelling the same to D3's trading account, without conducting any further enquiries;

(d) notwithstanding that the bank-in slip made reference to Cheque No 300545, D1 failed to make any enquiries as to whose Cheque No 300454 was to determine the owner of the RM10m fund. If the same was done, it would be immediately apparent that it was the plaintiff (and not D2) who deposited the RM10m with D1 specifically and there was no intention to transfer the same to D3;

(e) D1 failed to enquire at all and/or failed to make reasonable enquiries with the plaintiff (who deposited the RM10m), to ascertain if there was any mandate or authorisation to transfer the said sum to D3's trading account. If this was done, it would have been immediately apparent that the plaintiff had not authorised the transfer the RM10m into D3's trading account;

(f) notwithstanding that RM10m was a large sum, D1 failed to conduct any further enquiries to determine the source of the sum;

(g) despite being tasked to provide an additional layer of security to the decisions of SP2 and tasked to ascertain the source of funds, D1's Credit Control Department had failed to verify the same;

(h) D1's own internal auditors had acknowledged that there was a major problem ('masalah besar') with the channelling of the RM10m into D3's trading account;

(i) D1's own internal investigations acknowledged that D3 had used a third party cheque to channel monies into its trading account;

(j) SP2 (D1's officer) was reprimanded by the Securities Commission for his role in the abovementioned transaction;

(k) D1's request for SP2 to sign a disclaimer form to absolve D1 of any liability in respect of the above-mentioned transaction was also indicative of the severity of the entire transaction at hand; and

(l) in the light of the anti money laundering regime that D1 as a reporting institution operates in, it had failed to even ascertain who its customer was before dealing with such a substantial sum of funds.

WHETHER THE LOSS OR DAMAGE COULD BE FORESEEABLE ARISING FROM THE BREACH OF THE DUTY OF CARE

[167] What is foreseeable is that the monies would then be outside the control of the plaintiff and D1 once it is transferred out without proper mandate from the plaintiff and the consequential and natural losses would be as certain as day would follow night.

[168] Even if no instruction is received from the plaintiff, D1 would be still obliged to keep the sum of RM10m until it could be ascertained whose monies it is and what was the reason for its deposit. It would not be the business of D1 to convert it for its own use.

[169] If the plaintiff is not a customer of D1 as argued by D1, then D1 must return the sum of RM10m to the plaintiff. If the plaintiff is accepted as a customer of D1 then D1 must get the necessary mandate from the plaintiff as to whether the sum of RM10m is to be transferred to D3.

[170] Merely because there had not been established a contractual banker-customer relationship does not necessarily mean that there could not arise a duty of care under the tort of negligence. Granted the usual way is for the prospective customer to complete the standard application form to open an account which is then verified and accepted by the bank and an account opened.

[171] D1 as an investment bank cannot, on the one hand, say that the plaintiff is not a customer of the bank and yet allow the funds deposited with it to be transferred out.

[172] D1 as an investment bank is accustomed to receiving deposits from customers with respect to investments made by various customers who have opened an account with it. Most of the time it would have no difficulty identifying the customers who already have an account with it. Where the deposit is from a depositor who is not yet its customer, it would first ascertain who the depositor is and request for the proper identification documents of the customer and the resolution of the body corporate so that it knows who has the mandate to give authorisation for it to deal with the funds. The contract containing the terms and conditions governing the opening of the accounts with the investment bank for the investment would also be entered into.

[173] The moment a sum of monies is deposited with D1, it is for D1 to ascertain whose monies it is and to act accordingly. Without knowing the depositor the investment bank cannot act on the instruction of a third party who may well be its customer to transfer that sum of monies deposited of RM10m and in fact justifying that it does not have to know who the depositor is!

[174] That would be completely out of sync and indeed alarming for an investment bank, accustomed as it is to receiving many amounts of such a nature into its common pool account, to allow that common pool to become a cesspool where corrupt practices may fester.

[175] D1's breach of its duty of care undoubtedly caused the plaintiff to suffer the loss of RM10m. We agree with learned counsel for the plaintiff that but for D1's breach, the RM10m would not have been channelled to D3's trading account which then enabled D3 to siphon off the monies shortly thereafter.

[176] As submitted by learned counsel for the plaintiff, none of the above facts and issues, which were critical and determinative of the culpability of D1 in the cause of action of negligence, were considered in the learned HCJ's GOJ.

[177] The learned HCJ misapprehended the facts when he laboured under the misconception that the plaintiff had not adduced any evidence to show why the cheque had been issued to D3 for purposes of investment which was allegedly organised and managed by D1 (para 20). The incontrovertible evidence was that the cheque was issued to D1 and what was lacking was further instruction thereafter; with the plaintiff thinking that D1 would be managing the funds following the letters given which turned out to be a forgery and fraud.

[178] Whilst the plaintiff may be acting under a perceived misconception, D1 being an investment bank must act not on perception but on proper mandate

from the depositor of funds with it for investment purposes. When it does not do so, it exposes itself to being held liable for negligence.

[179] The learned HCJ further erred when he held at para 23 of his GOJ that the evidence does not show that the RM10m invested had been received by D1. It is not disputed that the cheque was cleared and the RM10m came into D1's account. Whilst D1 may not have instructions to invest it, it is equally clear that there was no instruction from the plaintiff to transfer the sum out to D3.

[180] We are of the view that the learned HCJ had failed to appreciate the evidence before him and had been plainly wrong to come to the conclusion that he did that D1 was not liable in negligence.

WHETHER THE CAUSES OF ACTION FOR MONIES HAD AND RECEIVED, MISTAKE OF FACT AND CONSTRUCTIVE TRUST MAY BE HEARD ON APPEAL THOUGH NOT PLEADED

[181] The plaintiff submitted for the first time on appeal on monies had and received, mistake of fact and constructive trust. It was argued that the material facts have been adequately pleaded to establish these causes of action above and that this court, on appeal, is entitled to draw the necessary legal consequences based on such facts.

[182] It was further argued that evidence on these causes of action were presented during trial and was not objected to by D1; as such any defect in the pleadings would be cured.

[183] Learned counsel for D1 objected to such a back door move to introduce new causes of action not pleaded and cited as proposition for the above principle in the Federal Court case of *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 that 'any radical departure from the pleaded case which is not just a variation, modification or development of what has been alleged in the pleading in question, must be specifically pleaded'.

[184] Learned counsel for the plaintiff submitted that the causes of action of monies had and received, mistake and constructive trust all possess a common theme with the plaintiff's pleadings in the amended statement of case — namely, that the plaintiff's RM10m was deposited into D1 pursuant to a mistake and that D1 owes a duty/obligation to the plaintiff not to transfer the same to a third party in D3. These causes of action are hence not a radical departure from the pleaded case and are, at best, a mere variation or development of facts in the pleadings.

[185] With respect, we do not think that a case argued on negligence can be further stretched and shoehorned to sustain and support other causes in the like of money had and received, mistake of fact or constructive trust without pleading facts peculiar to such separate causes of action.

[186] We agree with learned counsel for D1 that in *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 at pp 716–719 (FC), the Federal Court refused to allow issues to be argued of amongst others constructive trust that were raised for the first time on appeal. The Federal Court said:

> [54] *It is not in dispute that the issues of constructive trust, fraud, fraudulent breach of trust, dishonesty and the application of s 22 of the Act were only raised for the first time by the plaintiff's counsel at the hearing of the present appeal before us. The issues were not raised at all in the courts below. The issues were neither pleaded in the plaintiff's pleadings*, nor in the amended statement of claim when the second defendant was added as a co-defendant. Neither had the plaintiff filed any reply to the second defendant's statement of defence when the second defendant pleaded the defence of limitation. *The plaintiff's counsel also conceded before us that these matters were never pleaded and raised in the courts below*.
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> ...
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> [60] *It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded*. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; and *Blay v Pollard and Morris* [1930] 1 KB 628).
>
> [61] The issues of constructive trust, fraud and fraudulent breach of trust as raised by the plaintiff are vital issues in bringing into play the exceptions to limitation period under s 22 of the Act. They must be specifically pleaded in the pleadings, failing which, as rightly held by the Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, they 'could not be allowed to be argued and to succeed on appeal'.
>
> ...
>
> [66] *As stated earlier in this judgment, the issues relating to the exception to limitation period under s 22 of the Act was only raised by the plaintiff for the first time during the hearing of this appeal before us, but not in the courts below. That should not be allowed.* As correctly expressed by Willmer LJ in *Thomas v Marconi's Wireless Telegraph Co Ltd* [1965] 1 WLR 850 (cited with approval by this court in *Selangor Omnibus Co Ltd v Transport Workers' Union, Malaya & Ors* [1968] 1 MLJ 242): *'It is right that an appellant should be precluded from raising here for the first time a point not taken below'. We fully agree.*
>
> [67] In the recent case of *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 6 MLRA 677, this *Federal Court ruled that any radical departure from the pleaded case which is not just a variation, modification or development of what has been alleged in the pleading in question, must be specifically*

pleaded. Any unpleaded matter ought to be disregarded by the court. In the present appeal it is our finding that the issues relating to constructive trustee, fraud, fraudulent breach of trust, dishonesty and s 22 of the Act as raised by the plaintiff's counsel clearly amounted to radical departure from the pleaded case of the plaintiff as appeared in its amended statement of claim and therefore ought not to be allowed. (Emphasis added.)

[187] Likewise in *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141 at pp 145–146 (FC), the Federal Court refused to entertain an appeal as the respondent there was asked to argue the appeal on a basis that was not raised at first instance:

[6] We were puzzled why, in the face of such a simple complaint by the appellants the respondent had not taken the rather obvious step of producing the architect's certificate. However, counsel for the respondent pointed out that this had not been done because the frontal attack at first instance was not on the non-compliance with cl 23 but that no application had been made to the relevant local authority for a certificate of fitness. Accordingly, the respondent was being asked to argue its case on a basis never put by the appellants to the High Court in the first place. Had the appellants' case been that cl 23 had not been complied with, then the respondent would have produced the appropriate certificate.

[7] Having perused the cause papers placed before the High Court, we are inclined to agree with learned counsel for the respondent. Nowhere in the affidavits filed in support of their originating summons did the appellants assert a violation of cl 23. In particular, there was no averment that the respondent's architect's certificate had not been served on the appellants. The thrust of the appellants' case appears to be that no application was ever made to the relevant local authority for a certificate of fitness. And it is in answer to that assertion that the respondent produced the relevant application.

[8] *It is settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice.* The several authorities on the subject were collected and discussed in the judgment of Jemuri Serjan SCJ in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428. We would also refer to *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 which sufficiently demonstrates the point.

[9] *It would be manifestly unjust for the appellants to succeed before us on a point not taken before the High Court.* Thus, although leave was granted to the appellants, we find it unnecessary to answer the question posed. It has become academic by virtue of the way in which the case was placed before the High Court. (Emphasis added.)

[188] We were also referred to *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467 at pp 482–483 (CA), where the Court of Appeal similarly held:

[30] To begin with, it will be noted that *the appellant did not expressly plead in its statement of claim nor in its defence to the counterclaim that the respondent does not have locus standi. During trial, the respondent's witnesses were not cross-examined on it. The lack of locus was also not raised in the appellant's written submission and submission*

in reply in the High Court and neither did the appellant expressly include it as a ground of appeal in its memorandum of appeal. The issue of the lack of locus under the BCP (M&M) Act read with the Strata Titles Act was raised for the first time in the appellant's written submission in this appeal.

...

[32] *In our judgment the appellant is precluded from raising the locus standi point for the first time in this appeal. It is trite that an appellant is precluded by law from raising a point in an appeal which has not being pleaded or raised in evidence during trial. It is well settled that the Court of Appeal will not, save in limited cases, entertain a point of law not taken at first instance or a point not canvassed in the court below* as was stated by Justice Gopal Sri Ram JCA (as he then was) in the case of *Hj Ali bin Hj Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29 (CA). *The rationale for this ruling is quite obvious in that the issue not having been raised in the court below, was not challenged by the respondent nor considered and ruled upon by the trial judge*.

[33] The appellant did not include the lack of locus as a ground in its memorandum of appeal and neither did it apply to amend the memorandum of appeal to do so. There is a plethora of weighty decisions that *an appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum of appeal as a matter of essential justice*, that is justice to the court below and to the respondent who would have to defend a judgment of the High Court on an unpleaded ground of appeal (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; *Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd* [2007] 2 CLJ 25; [2007] 4 MLJ 128; *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 and the recent case of *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61). (Emphasis added.)

[189] The cross-examination of the plaintiff's witnesses by learned counsel for D1 had been focused on the allegations of negligence and that was the issue at play at the trial and not that raised for the first time in this appeal.

[190] At any rate, if the plaintiff cannot succeed on negligence, we do not think it can succeed based on the causes of action founded on money had and received, mistake of fact and constructive trust. Likewise, should the plaintiff be able to succeed on negligence, the other causes of action would not have been necessary.

DECISION

[191] We find that D1 had been negligent in transferring the sum of RM10m deposited with it to D3's account. We would allow the appeal and set aside the order of the High Court. We would allow the plaintiff's claim and enter judgment for RM10m less the RM73,000 dividend received from D3 ie for RM9,927,000 together with interest as prayed for from date of judgment to realisation.

[192] After hearing the parties on costs we order costs of RM40,000 here and below to the appellant subject to allocator.

Appeal allowed and order of High Court set aside with costs of RM40,000 here and below to appellant subject to allocator.

Reported by Dzulqarnain Ab Fatar